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No. 00-1307

Supreme Court, U.S.
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In The Supreme Court of the United States

WALTER A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

SIGMON COAL COMPANY, INC. and JERICOL MINING, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commissioner of Social Security violates section 9701(c)(2) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701(c)(2), by assigning beneficiaries in the UMWA Combined Benefit Fund to the successor in interest of the signatory operator that actually employed the beneficiaries.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties. Respondents, Sigmon Coal Company, Inc. and Jericol Mining, Inc., have no parent or subsidiary corporations that require disclosure under Supreme Court Rule 29.6.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner asks this Court to review the Fourth Circuit's decision in *Sigmon Coal Co. v. Apfel*[1] applying the plain language of section 9701(c)(2) of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). 26 U.S.C. § 9701(c)(2). In *Sigmon Coal*, the Fourth Circuit invalidated as

[1] *See Sigmon Coal Co. v. Apfel*, 33 F. Supp. 2d 505 (W.D. Va. 1998), *aff'd*, 226 F.3d 291 (4th Cir. 2000), *reh'g denied* (Nov. 15, 2000)(en banc)(decisions appended to Petitioner's Brief at 65a - 78a, 1a - 44a, 81a - 82a)("Pet. Appdx. at __").

unlawful 86 Coal Act assignments the Commissioner of Social Security (Commissioner or SSA) made to Respondent Jericol Mining, Inc. Section 9701(c)(2) defines specific relationships which, if shown to exist, authorize the Commissioner to assign to a so-called "related person" responsibility to pay annual statutory health care premiums covering certain union-represented retired miners (and their eligible dependents) based on the related person's carefully defined relationship (as of a date certain) to the statutorily defined "signatory operator," *see* 26 U.S.C. § 9701(c)(1), that actually employed the miner. This "related person" definition, however, plainly does not include language authorizing such beneficiary assignments to be made to a successor in interest to the signatory operator.

Petitioner's primary argument is that (i) the Fourth Circuit erred when it applied the language of section 9701(c)(2) as written, because a plain reading of the related person definition purportedly yields an absurd result; and, (ii) the court's rejection of the Commissioner's absurd result argument has created an intolerable circuit split.

As Respondents demonstrate below, however, the statutory construction argument was correctly decided by the Fourth Circuit. More significantly, the recent circuit split on this discrete statutory interpretation issue is tolerable and deserving of percolation as its potential private party and programmatic consequence is at best marginal and limited. Accordingly, the Court's resources are thus best served by not

elevating the instant petition or the *Aloe Energy*[2] petition to its discretionary docket, a docket necessarily reserved for 90 or so of the most meritorious cases screened each term.

STATEMENT

Between 1993 and 1997 the Commissioner assigned Respondent Jericol Mining, Inc. (Jericol) Coal Act premium responsibility for 103 retired UMWA-represented coal miners (and their dependents) eligible to receive health benefits from the UMWA Combined Benefit Fund (UMWA Combined Fund). The Commissioner assigned each of these beneficiaries pursuant to the third tier, *see* 26 U.S.C. § 9706(a)(3), of Congress's three-tiered assignment priority. 26 U.S.C. § 9706(a)(1)-(3); *see generally Eastern Enters. v. Apfel*, 524 U.S. 498 (1998)(invalidating third-tier assignments made by the Commissioner to an assigned operator that had never signed the

[2] The Solicitor General's suggestion, *see* Pet. at 15, that the Court shelve the instant petition while it screens an application the Solicitor General's office did not oppose, s*ee Aloe Energy Corp. v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000), *petition for cert. filed* (U.S. Nov. 2, 2000)(No. 00-725), unnecessarily suppresses debate on the threshold issue of whether the identical issue of statutory construction presented in *Aloe Energy* and *Sigmon Coal* is of such moment as to merit the Court's discretionary review. Respondents therefore request the Court to screen these applications in tandem when *Aloe Energy* is redistributed for Conference.

watershed 1974 (or later) national coal wage agreement with the UMWA).[3]

In fact, only 17 of the assigned miners actually worked for Jericol; the other 86 (the Shackleford Retirees) last worked for an unrelated company, Shackleford Coal Company (Shackleford). *Sigmon Coal*, 226 F.3d at 305 ("Jericol never actually employed any of the miners at issue.") (Pet. Appdx. at 29a). Notwithstanding that Shackleford did not sign the watershed 1974 coal wage agreement and that the 86 miners retired from employment with Shackleford prior to June 1973 when Shackleford sold to Jericol the facility where they had

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[3] In an attempt to distance Jericol's factual situation from the third-tier Coal Act assignments the Court reviewed and found unconstitutional in *Eastern Enterprises*, the Solicitor General misreads the agency correspondence and applicable judicial decisions, asserting erroneously that the instant case "does not involve assignments made under the third tier." Pet. at 5-6 n.2. *But see* Pet. Appdx. at 59a ("Since Shackleford is a pre-[19]78 [coal wage agreement] signatory and employed the miner for more than 24 months the assignment must be made under category three"); *Sigmon Coal*, 33 F. Supp. 2d at 507 (Pet. Appdx. at 69a)("This assignment was based on 26 U.S.C. § 9706(a)(3).").

The only reason *Eastern Enterprises* is not "directly relevant to this case," *see* Pet. at 6 n.2, is that *at this juncture* Respondents' supplemental complaint averring that the 86 third-tier Coal Act assignments at issue cross the constitutional line drawn by the Court has been held in abeyance pending the ultimate disposition of the single issue of statutory construction resolved in Respondents' favor below. *See Sigmon Coal*, 33 F. Supp. 2d at 506 (Pet. Appdx. at 66a).

worked, in assignment notices directed to Jericol in the mid-1990s SSA stated that it had allocated the Shackleford Retirees to Jericol due to its purported status as a successor or a successor in interest to the long-defunct Shackleford Coal Company.

After SSA rejected Jericol's administrative challenges, Respondents filed suit in the United States District Court for the Western District of Virginia. On November 18, 1998, Senior District Court Judge Glen Williams granted summary judgment in their favor and ordered the challenged assignments withdrawn consistent with his finding that the Coal Act does not provide "for liability to be laid at the door of successors of defunct signatory operators." *Sigmon Coal*, 33 F. Supp. 2d at 509 (Pet. Appdx. at 74a). After full briefing and oral argument by the parties (and by Amici Trustees of the UMWA Combined Fund) the Fourth Circuit affirmed, *see Sigmon Coal*, 226 F.3d at 309 (Pet. Appdx. at 36a), and subsequently denied the Commissioner's suggestion for rehearing (supported by Amici) on November 15, 2000. (Pet. Appdx. at 81a - 82a).

REASONS FOR DENYING THE WRIT

1. Discretionary Review Is Unwarranted Because The Court Below Properly Applied The Plain Language Of The Coal Act's Definitional Provision.

Since the statutory language is plain on its face, *Chevron One* is fully dispositive here. *See Chevron U.S.A., Inc.*

v. NRDC, Inc., 467 U.S. 837 (1984).[4] The Commissioner's resort to the agency's evolving interpretative guidelines (issued without the benefit of notice and comment rulemaking), *see* Pet. Appdx. at 83a - 94a, to overcome Congress's plain and unambiguous definitional language to justify assigning Coal Act beneficiaries to a purported successor in interest of a signatory operator is arbitrary and plainly exceeds the scope of his delegated authority. As the Fourth Circuit held, application of the plain language does not lead to an inexplicable or absurd result.[5] Congress and Congress alone has the power to amend the "related person" definition in section 9701(c)(2) to provide

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[4] Respondents are not aware of a single court (or judge) that has construed the related person definition to be ambiguous. *See, e.g., R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 894 (D.C. Cir. 1999) ("We are unable to quarrel with the district court's conclusion that the agency's construction of the related person definition is 'tortured.'").

[5] *Compare Sigmon Coal*, 226 F.3d at 307-308 (Pet. Appdx. at 33a - 34a)(recognizing as "certainly plausible" Respondents suggestion that "in an industry where buying and selling coal mining assets is commonplace, [holding successors in interest to defunct signatory operators liable for Coal Act assignments based on the coal operator's employment relationships dating back in some cases to the 1940s] would present a significant impediment to the coal companies' support for the Coal Act, which, in turn would supply Congress with a motive for omitting the provision" *with R.G. Johnson*, 172 F.3d at 895 ("When we asked counsel for [R.G.] Johnson if she could provide any plausible reason why Congress should have intended such an exemption, the only explanation she was able to suggest was that coal mining operators had more effective lobbyists in Washington. . . . We find this explanation less than compelling.").

for liability to be laid at the door of successors of defunct signatory operators.

The unusual and contentious manner in which the Coal Act was shepherded through Congress as part of the Energy Policy Act of 1992 reinforces the principle that, subject to constitutional considerations, reviewing courts are to give effect to the law as written and leave to the legislature the task of overriding through amendment otherwise clear statutory language.[6] The Energy Policy Act of 1992 was enacted on October 20, 1992. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). This legislation was the culmination of 20 months of crafting, deliberations and compromise, and was heralded as a comprehensive response to the country's energy issues. *See generally* Jim Rossi, *Lessons from the Procedural Politics of the Comprehensive Energy Policy Act of 1992*, 19 Harv. L. Rev. 195 (Winter, 1995) (hereinafter "Rossi"). No less than twelve separate congressional committees exercised jurisdiction over this important legislation and no less than 100 members of the House and Senate served as conferees for purposes of hammering out the final language in the legislation's twelve

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[6] *See, e.g.*, 146 Cong. Rec. S3835 (daily ed. May 10, 2000)(printing for the record S.2538 -- the Coal Miner and Widows Health Protection Act of 2000 -- which at Sec. 4(a) provided as follows: "The last sentence of section 9701(c)(2)(A) of the Internal Revenue Code of 1986 (defining [Coal Act] related person) is **amended** to read as follows: 'A related person shall also include . . . a successor in interest of the signatory operator itself.'")(emphasis added).

separate titles. 138 Cong. Rec. H11405 (daily ed. Oct. 5, 1992)(statement of Rep. Brown). These titles addressed such wide ranging and hotly contested issues as electricity deregulation, nuclear power licensing and waste storage, global warming, and synthetic fuel subsidies. *Id.*

The Coal Industry Retiree Health Benefit Act of 1992 was included in the Senate version of this comprehensive energy package in late July 1992 as special interest legislation designed to remedy the provision and funding of health benefits for certain retired union coal miners.[7] Codified as an amendment to the Internal Revenue Code of 1986, 26 U.S.C. §§ 9701- 9722, this title of the Energy Policy Act of 1992 was meticulously crafted to garner a consensus among the many

[7] The Coal Act constituted a fundamental, though purposefully discrete, departure from federal labor policy because from 1947 until 1992 the terms and conditions pursuant to which coal operators that employed UMWA-represented workers agreed to pay monies dedicated to their former employees' health benefits was hammered out in private party negotiations. *See generally Eastern Enters.*, 524 U.S. at 2150. As of 1992, however, there was serious and growing concern that these privately bargained-for benefits would be interrupted, suspended or terminated, prompting a nationwide strike in the coal fields. *See generally McGlothlin v. Connors*, 142 F.R.D. 626, 631 (W.D. Va. 1992)(noting that on January 6, 1992 the Trustees of the UMWA Health and Retirement Funds informed the Bituminous Coal Operators' Association that they intended to "notify the beneficiaries of each of the benefit plans on or about March 1, 1992, that there will be insufficient funds to assure payments for future covered services and that payments will therefore be suspended until such additional funding is provided.").

interested groups affected by this particular legislation.[8] Rossi, *supra* at 217 - 222.

Notwithstanding the evolution of this compromise legislation, the Solicitor General urges review of the Fourth Circuit's refusal to insert language in section 9701(c)(2) to expand the statutorily defined universe of Coal Act "related persons" to include "a successor in interest of a signatory operator." Judges, however, are properly reticent to re-legislate a clear definitional provision even when confronted by the inevitable claim, as advanced by the Commissioner (and Amici

[8] The "compromise" UMWA retiree health benefit financing language was approved as an amendment to H.R. 776 on the Senate floor on July 29, 1992. *See generally* 138 Cong. Rec. S10783 (daily ed. July 29, 1992)(statement of Sen. Rockefeller)("During the last few weeks I have been involved in intense and lengthy negotiations on this legislation. We have debated arcane points of law and obscure data about every facet in the coal industry. . . . This has been one of the most contentious pieces of legislation I have worked on in the Senate. I have said from the beginning that my goal was to protect the health care of retired coal miners and their families, and that I was not wedded to the details of how to do it. . . . The current approach is the one sought by the [Bush] administration and in the end it appeared to be the one most likely to command a consensus in the legislative process."); *see also* 138 Cong. Rec. S10784 (daily ed. July 29, 1992)(statement of Sen. Wallop)("I believe that the resolution which we have arrived at is as fair as we could possibly make it. . . . In this resolution, all of us wish there were some little piece of it that we could have left as originally drafted, or not have included even as drafted. But, having said that, I think it shows the best traditions of the Senate that a resolution to a very sticky, very thorny problem was arrived at in as fair and equitable a manner.")

Trustees of the UMWA Combined Benefit Fund) below, that Congress's unambiguous language creates inequities, fosters absurd results or frustrates overarching legislative intent. *See Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570-71 (1982)(where the intent of Congress is expressed in the text of a statute in reasonably plain terms reviewing courts must give effect to that intent as the text of the statute is the most persuasive evidence of Congress's intent).

Crooks and its Coal Act progeny[9] control the inquiry here. In *Crooks*, a decedent's executors claimed that provisions in section 402 of the tax code were incongruous, should be

[9] *See, e.g., Dixie Fuel Co. v. Apfel*, 171 F.3d 1052, 1063 (6th Cir. 1999)(holding that the plain language of the statute "is the end of the matter," while enjoining certain assignments to a purported related person as in excess of the SSA's delegated authority and rejecting as "misguided" the Commissioner's attempt to create an ambiguity in the plain and unambiguous language of section 9706(a) of the Coal Act); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 522 (D.C. Cir. 1996)(refusing to rewrite or recast reasonably clear Coal Act definitional language while lingering briefly in order to reject ambiguities allegedly lurking in the text of section 9703(f) and the invitation to read the statute through the lens of equity as "blatantly rewriting" the statute). *National Coal Ass'n v. Chater*, 81 F.3d 1077, 1081-1082 (11th Cir. 1996)(holding the statutory premium calculation formula in section 9704(b)(2) of the Coal Act is clear on its face, while invalidating the Commissioner's prior determinations of the annual, per-beneficiary health benefit premium as unlawful miscalculations, and rejecting the agency's claim that its reading of Congress's statutory formula was compelled by the statute's overrarching purposes).

rejected as "leading to absurd results" and further urged the Court, as does Petitioner here, to adopt a construction supposedly "in harmony" with the spirit and purpose of the law. *Crooks*, 282 U.S. at 59. The Court declined this invitation to override the legislature's plain language, underscoring that "[u]nless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it has done so in plain terms . . . . it is not within the province of the court to modify the law by construction."[10]

This division of authority between coordinate branches must apply with particular force where, as here, the legislative history, *see supra* n.8, and contemporaneous extra-textual sources[11] underscore that the statute in question resulted from

[10] *Id.* at 61. Like the federal estate tax provisions at issue in *Crooks*, the Coal Act is housed in the Internal Revenue Code, and every appellate court that has addressed the issue has found Coal Act premiums are taxes. *See, e.g., In re Chateaugay*, 53 F.3d 478, 498 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995); *Pittston Co. v. United States*, 199 F.3d 694, 702 (4th Cir. 1999); *In re Sunnyside Coal Co.*, 146 F.3d 1273, 1276-80 (10th Cir. 1998).

[11] *See* Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal-Tax Provision*, 50 Cong. Q. Wkly. Rep. 2166 (July 25, 1992) (describing key senators closeted even after scheduled 7:20 p.m. cloture vote on the energy bill in the offices of the Senate president pro tempore with a "cluster of lobbyists outside" speculating that a deal was at hand only for key players to emerge to cast opposing votes on the cloture petition); Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 Cong. Q. Wkly. Rep. 2261 (Aug. 5, 1992)("Negotiators worked through the weekend to reach an accord on the coal issue and by July 28 were confident a deal was set. . . . But even as senators began the 93-3 cloture vote, the coal

difficult legislative compromises. Perhaps the most compelling evidence of the fragile Senate compromise which enabled the Coal Act (and the eleven other titles of the Energy Policy Act of 1992) to become law is found in the contemporaneous remarks of House conferees who found themselves barred from correcting **any** language in the UMWA retiree health benefit title of the energy bill submitted to conference by the Senate. As then-Chairman of the House Ways and Means Committee Dan Rostenkowski lamented on the floor of the House on October 5, 1992:

> The House conferees are very uneasy with the provision included in the Senate bill for financing these [retiree] benefits. It appears to create numerous inequities among the companies that will be required to pay for these benefits, and could set an unfortunate precedent for legislating a solution to what is in essence a private dispute.
>
> Yet in spite of these seemingly major and perhaps fatal flaws in their amendment, the Senate presented this to the House conferees on a take-it-or-leave-it basis – threatening defeat of the most comprehensive energy legislation in years if even the smallest problem were corrected by House conferees. The House conferees were prevented from undertaking good faith negotiations on the enumerable problems with the Senate version which have been brought to our attention.

See 138 Cong. Rec. H11408 (daily ed. Oct. 5, 1992) (statement of Rep. Rostenkowski).

Respondents concur with Chairman Rostenkowski's observation concerning numerous inequities and major flaws in the Coal Act. However, these comments foreshadow the wisdom of judicial forebearance when invited to ignore clear statutory language. Not only does a court risk running roughshod over delicate political compromises when it re-writes plain language, the doors are swung open to judicial correction of every harsh, odd or inconsistent consequence that flows from application of every plain directive in the statute.

2. Review Is Unwarranted Because The Recently Emerged Split Among The Circuits Is Neither Over An Issue Of Sufficient Importance Nor Profound.

The simple existence of a conflict among the federal circuit courts of appeals is not necessarily sufficient, standing alone, to warrant exercise of the Court's certiorari jurisdiction. *See generally* Robert L. Stern et al., *Supreme Court Practice* at 168-173 (7th ed. 1993). Rather, the Court's jurisdiction is properly reserved to resolve important issues of federal law, and

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deal was unraveling. It took until about 11 that night to resolve the snag, finally clearing the way for floor consideration of the energy bill the next day.").

then only when the circuit split on an important issue is profound or widespread. *Id.* at 170-171. The instant case fails to meet either criteria.

a. This Case Does Not Present An Important Issue of Federal Law.

The Solicitor General suggests that the issue in the *Aloe Energy* petition (and hence the issue decided against the Commissioner in *Sigmon Coal*) is among the 90 or so this term that merit the Court's discretionary review. Yet, as discussed below, the split among the circuits as to whether the Coal Act "related person" definition should be judicially amended does not present an important issue of federal law for two reasons. First, the split involves an issue that has little practical implication. Second, the split will not likely recur or substantially affect future conduct of private parties or the Government.

The decision below, like the contrary decisions that preceded it in *R.G. Johnson* and *Aloe Energy*, involved only a question of which among several potentially liable parties would be responsible for bearing the cost of health benefits for a small number of UMWA retirees eligible to receive health benefits from the UMWA Combined Fund.

First, the outcome of the Commissioner's allocation of financial responsibility has absolutely no impact on these retirees. They will receive their health benefits from the UMWA Combined Fund regardless of where the allocation comes to rest. Thus, to the 50 or so UMWA retirees SSA

collectively assigned R.G. Johnson and Aloe Energy, and the 86 retirees formerly assigned to Respondent Jericol, the split is meaningless.

Second, the split should likewise be of no moment to the UMWA Combined Fund. It will continue to be reimbursed for the costs it incurs in providing these beneficiaries' health benefits, from an assigned operator or, if they cannot be assigned to an operator, from other sources of funds made available by Congress.[12]

Third, the split has, at best, a negligible impact on SSA's implementation of its one-time Coal Act assignment task. Congress directed SSA to complete the task of making beneficiary allocations (including all allocations based on related person status) prior to October 1, 1993. 26 U.S.C. 9706(a); *see generally Dixie Fuel*, 171 F.3d at 1064 (enjoining

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[12] In the case of assigned beneficiaries, the responsible operator pays an annual per-beneficiary health benefit premium to the UMWA Combined Fund set by SSA pursuant to the formula codified in section 9704(b). In the case of unassigned beneficiaries, the UMWA Combined Fund receives transfer payments from the overfunded UMWA 1950 Pension Plan, or from annual interest generated on monies paid by coal operators and held by the U.S. Department of the Interior's Abandoned Mine Reclamation Fund. 26 U.S.C. § 9705; 30 U.S.C. § 1232(h)(3)(A). As a fallback (and to date untapped) measure, the Coal Act provides that all assigned operators may be assessed a pro rata premium, if necessary, to ensure that the UMWA Combined Fund receives the amount needed to pay for unassigned beneficiaries' health benefits. 26 U.S.C. § 9704(a)(3), (d); *See Eastern Enters.*, 524 U.S. at 514 n.3 (unassigned beneficiary liability thus far been covered through transfer of funds from other sources).

as *ultra vires* assignments initially made to a purported related person beginning in 1995 while holding that the Commissioner's authority to make initial Coal Act assignments expired on September 30, 1993). Furthermore, the total pool of eligible beneficiaries Congress charged SSA with assigning in 1993 was fixed by statute as of July 20, 1992. 26 U.S.C. § 9703(e); *Fawn Mining*, 80 F.3d at 522. Therefore, assignments which implicate application of the Coal Act related person definition occurred (or should have occurred) more than seven years ago.

This notwithstanding, the Solicitor General now suggests that SSA "believes" that a "substantial number" of the some 16,500 related person assignments involve the Commissioner's attempt to lay Coal Act liability at the door of successors in interest of defunct signatory operators. *See* Pet. at 14 n.4. Respondents submit the exercise of the Court's certiorari jurisdiction requires more than an applicant's carefully couched belief where, as here, the suggested facts were never submitted for the record, let alone tested in discovery, and where seven years into the statutory scheme the very cases the Commissioner proffers as evidence that the issue has "spawned" litigation and is of significant and recurring importance have all been settled (apparently on the Government's initiative) and removed from active court dockets.

For example, just last July in the *Aloe Energy* case the Commissioner filed a motion to publish after the panel issued its unpublished decision. In moving the court for full-text

publication of its non-precedential ruling, the Commissioner referenced the decision in *R.G. Johnson* and the *Sigmon Coal* case and additionally observed:

> The Commissioner's Coal Act assignment decisions have spawned at least two other cases involving this issue, *see Sager Coal Co. v. Apfel*, Civil Action No. 96-1107 (W.D. Pa.), and *Fayette Fuel, Inc. v. Apfel*, Civil Action No. 96-2209 (W.D. Pa.), and the issue appears to be involved in a case recently filed in the Western District of Virginia, *see Humphrey's Enterprise, Inc. v. Commissioner of Social Security*, Civil Action No. 2-00-CV-00022. The Commissioner believes there to be a strong likelihood, given the number and complexity of the Coal Act assignments he has made and continues to make, that further cases involving this issue will continue to arise.

Commissioner's Motion for Publication of Memorandum Opinion, filed July 5, 2000, at 2-3, *Aloe Energy Corp. v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000)

These assertions do not bear the weight attributed them. Third Circuit docketing records confirm that *Sager Coal* and *Fayette Fuel* were both dismissed through a joint stipulated settlement in the fall of 1998 based on the Commissioner's representations that Coal Act assignments to these companies were void *ab initio* in the wake of the Court's ruling in *Eastern Enterprises*. Fourth Circuit docketing records confirm that

Humphrey's Enterprises was resolved through a joint stipulated settlement several months after the Commissioner's motion to publish was denied. The dearth of pipeline litigants some seven years into the statutory scheme underscores that uniform interpretation of section 9701(c)(2) does not rise to the level of importance warranting the Court's discretionary review.

If, as the Solicitor General intimates, *see* Pet. at 13-15, this issue is of potential programmatic consequence, then it should be considered further by the federal courts of appeals who now have, unlike the Third Circuit panel in *Aloe Energy Corp., v. Apfel*, No. 99-3915 (3rd Cir. June 20, 2000), the benefit of the Fourth Circuit's consideration of this statutory provision. *See Sigmon Coal*, 226 F.3d at 307-308 (Pet. Appdx. at 32a - 35a). On the other hand, if, as Respondents suggest, the importance of the circuit split on this statutory interpretation issue is marginal and limited in its potential consequences, then there will be no further cases to consider, which in itself will demonstrate that the issue does not merit this Court's attention.

Finally, even if the underlying split is important to Aloe Energy, R.G. Johnson and Respondents, it is of limited importance to the many other private parties that are subject to the Coal Act. Whether or not certiorari is granted to resolve the split, the impact of these three decisions on the conduct of private parties in the future would appear to be *de minimus*.

b. The Split Among The Circuits Is Not Profound Or Widespread.

Even if the split involved an important issue of federal law, it is not profound or widespread. The unpublished, non-precedential decision in *Aloe Energy* essentially adopted, without analysis, the *R.G. Johnson* rationale.[13] Thus, the split effectively exists only between two circuits with no other courts having had the opportunity to weigh in on the issue with a controlling opinion.

R.G. Johnson, the only published and therefore precedential decision in conflict with *Sigmon Coal,* is apparently no closer to final judgment now than it was nearly two years ago when the District of Columbia Circuit ruled in the Government's favor. The court remanded the case for further proceedings on the question of whether the pre-Act

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[13] The decision in *Aloe Energy* illustrates why the split is not profound. There a panel of the Third Circuit, in accordance with its internal operating procedures, specifically tracked the case as one having "no institutional or precedential value," took the case under advisement on the briefs without the benefit of oral argument, and issued its slip opinion stamped with the requisite and unmistakable disclaimer "UNREPORTED - NOT PRECEDENTIAL." It is a matter of public record that in *Aloe Energy* the panel denied the Commissioner's motion to publish after docketing Aloe Energy's brief, which opposed the motion on the ground that the case was properly designated as one having "no institutional or precedential value." *See* www.pacer.ca3.uscourts.gov (compiling *Aloe Energy* docketing information through the PACER system's established Third Circuit Internet site). Under these circumstances it is odd that *Aloe Energy* is now touted as a critical case deserving of the Court's discretionary review.

purchase of an operation in an arm's length transaction actually makes the transferee a successor in interest of the kind contemplated by the statutory definition. *R.G. Johnson*, 172 F.3d at 89; *see, e.g., In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996), *cert. denied*, 520 U.S.1118 (1997)("Should the successorship issue arise in a future case brought before us, we may then have to determine whether the last two words in the phrase 'successsor in interest' are meaningless or redundant.").

Indeed, the same issue remains open in the instant case, because the district court below did not reach the question of whether, in the first instance, Jericol's purchase of assets in 1973 made it a successor in interest to Shackleford Coal Company. *Sigmon Coal*, 33 F. Supp. 2d at 510 (Pet. Appdx. at 76a) (" it is not necessary for the court to determine what the term means."). Respondents here have also preserved a constitutional claim that the underlying assignments offend the Fifth Amendment in the wake of the Court's ruling in *Eastern Enterprises*. *See supra* n.3. Since the parties may prevail on alternative legal theories, the newly emerged split between the District of Columbia Circuit and the Fourth Circuit is not concrete because it does not involve litigants whose rights and liabilities would be fixed, even if the Court were to grant the petition.

It is also possible that the District of Columbia Circuit could reverse its position should another case presenting the same Coal Act related person issue arise in that Circuit. Significantly, the split panel in *R.G. Johnson* did not have

before it a plausible explanation for why Congress might have intentionally excluded successors in interest to a signatory operator from the Coal Act's "related person" definition. *See supra* n.5. Given the more extensive discussion of this very issue in *Sigmon Coal*, the D.C. Circuit (and for that matter the Third Circuit, which adopted the *R.G. Johnson* rationale in an unpublished opinion before *Sigmon Coal* was decided) could reconsider its position on this point.

CONCLUSION

Petitioner's application should be denied because it does not present an important question of federal law and because the newly emerged split among the federal circuits on the scope of the Coal Act's related person definition is tolerable and not profound.

Respectfully submitted.

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